Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–47 OF 2010
AZIAH ALI J
13 OCTOBER 2010

Administrative Law — Judicial remedies — Declaration — Application for — Disciplinary proceedings against university students — Whether s 15(5)(a) of the Universities and University Colleges Act 1971 unconstitutional — Whether declaration ought to be granted

Civil Procedure — Costs — Power to award costs — Whether there were special grounds for court to depart from general principle that successful party entitled to costs

Civil Procedure — Injunction — Application for — Erinford injunction — Principles and purpose of Erinford injunction — Whether court had jurisdiction to entertain application — Whether para 1 of the Schedule to the Courts of Judicature Act 1964 conferred jurisdiction on court to grant Erinford injunction

Constitutional Law — Legislation — Validity of impugned legislation — Whether s 15(5)(a) of the Universities and University Colleges Act 1971 unconstitutional

Muhammad Hilman bin Idham and four others ('the plaintiffs') were at all material times students of Universiti Kebangsaan Malaysia ('the third defendant'). When the third defendant commenced disciplinary proceedings against the plaintiffs, the latter filed the present originating summons ('the OS') wherein they sought, inter alia, a declaration that s 15(5)(a)of the Universities and Universities Colleges Act 1971 ('the Act') was unconstitutional. Pending the disposal of this originating summons, the plaintiffs filed an application for an interim injunction that the disciplinary action commenced against them by the third defendant be stayed pending the outcome of the substantive OS application. The third defendant agreed not to proceed with the disciplinary action commenced against the plaintiffs pending the disposal of the OS application. The parties agreed that the application for an interim injunction would be disposed off together with the OS application. After the judge had delivered his judgment as to the OS application, the plaintiffs made an oral application for the grant of an Erinford injunction

pending their appeal against the decision of this court. This oral application was made on the grounds, inter alia, that if the status quo was not preserved the appeal would be rendered nugatory/academic; that there was a reasonable prospect that the Court of Appeal would take a view that was different from the High Court; and that this case involved a novel point that was not frivolous. The plaintiffs also submitted that para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') conferred jurisdiction on this court to grant the Erinford injunction. The defendants objected to the application for an Erinford injunction. The third defendant submitted that an injunction was not a cause of action but merely a relief and that no injunctive relief was available pursuant to declaratory orders. Hence it was submitted that once the court had made its decision on the declarations sought for, the court was functus officio.

Held, dismissing the enls 1, 4, and the oral application for Erinford injunction with costs to the defendants to be taxed:

(1) A declaratory judgment made no positive order and could not be enforced by execution. As such a stay of a declaratory judgment did not arise. Further since there was no application for an injunction made in the OS, the court had no jurisdiction to entertain an application for an Erinford application (see paras 7–9).

(2) The plaintiffs' reliance on para 1 of the Schedule to the CJA was misconceived. As an Erinford injunction was not of the same genus as 'habeas corpus, mandamus, prohibition, quo warranto and certiorari' it did not come within 'or any others' in para 1 of the said Schedule and the *ejusdem generis* rule did not apply. As such para 1 of the Schedule to the CJA ought not to be interpreted as conferring jurisdiction on the court to grant an Erinford injunction. Further this action was commenced by way of originating summons whereas an application for any relief specified in para 1 of the Schedule to the CJA had to be made under O 53 of the Rules of the High Court 1980 (see paras 11–13).

(3) Although the present case was a public interest case that involved a novel point and the plaintiffs were students, these grounds were sufficient to constitute special grounds for this court to depart from the general principle that the successful party was entitled to be paid his costs. As such costs were awarded to the defendants to be taxed unless otherwise agreed (see para 17).

[Bahasa Malaysia summary

Muhammad Hilman bin Idham dan empat yang lain ('plaintif-plaintif') pada kesemua masa material merupakan penuntut-penuntut Universiti Kebangsaan Malaysia ('defendan ketiga'). Apabila defendan ketiga memulakan prosiding tatatertib terhadap plaintif-plaintif, plaintif-plaintif memfailkan saman pemula ini ('saman pemula') di mana mereka menuntut, antara lain, satu

deklarasi bahawa s 15(5)(a) Akta Universiti dan Kolej Universiti 1971 tidak berperlembagaan. Sementara menunggu keputusan saman pemula ini, plaintif-plaintif memfailkan permohonan untuk injunksi sementara bahawa tindakan tatatertib yang dimulakan terhadap mereka oleh defendan ketiga ditangguhkan sementara menunggu keputusan permohonan saman pemula substantif. Defendan ketiga bersetuju untuk tidak meneruskan dengan tindakan tatatertib yang dimulakan terhadap plaintif-plaintif sehingga pemutusan permohonan saman pemula. Pihak-pihak bersetuju bahawa permohonan untuk injunksi interim akan diputuskan bersama dengan permohonan saman pemula. Selepas hakim memberikan penghakiman bagi permohonan saman pemula, plaintif-plaintif membuat permohonan lisan untuk diberikan injunksi Erinford sehingga pendengaran rayuan mereka terhadap keputusan mahkamah ini. Permohonan lisan ini dibuat atas alasan, antara lain, bahawa jika status quo tidak dikekalkan rayuan akan menjadi tidak berguna/akademik; bahawa terdapat prospek munasabah bahawa Mahkamah Rayuan akan memberikan pendapat yang berbeza daripada Mahkamah Tinggi; dan bahawa kes ini membabitkan poin yang baru yang bukan remeh. Plaintif-plaintif juga menghujah bahawa perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 ('AMK') memberikan bidang kuasa kepada mahkamah ini untuk memberikan injunksi Erinford. Defendan-defendan membantah permohonan untuk injunksi Erinford. Defendan ketiga menghujah bahawa injunksi bukan kausa tindakan tetapi merupakan relief semata-mata dan tiada relief injunksi boleh diberikan berikutan perintah-perintah deklarasi. Maka dihujahkan bahawa jika mahkamah telah membuat keputusannya terhadap deklarasi yang dipohon sekali, mahkamah adalah functus officio.

Diputuskan, menolak lampiran 1, 4 dan permohonan untuk injunksi Erinford dengan kos kepada defendan-defendan untuk ditaksir:

(1) Penghakiman deklarasi tidak memberikan perintah positif dan tidak boleh dikuatkuasakan melalui pelaksanaan. Oleh itu penangguhan penghakiman deklarasi tidak timbul. Selanjutnya, oleh kerana tidak ada permohonan untuk injunksi dibuat di dalam saman pemula, mahkamah tidak ada bidang kuasa untuk melayan permohonan untuk permohonan Erinford (lihat perenggan 7–9).

(2) Penggantungan plaintif-plaintif atas perenggan 1 Jadual kepada AMK disalah tanggap. Oleh sebab injunksi Erinford bukan genus yang sama seperti 'habeas corpus, mandamus, prohibition, quo warranto and certiorari' ia tidak terangkum dalam 'or any others' dalam perenggan 1 Jadual dan aturan *ejusdem generis* tidak beraplikasi. Oleh demikian perenggan 1 Jadual kepada AMK tidak boleh ditafsirkan sebagai memberikan bidang kuasa kepada mahkamah untuk memberikan injunksi Erinford. Selanjutnya tindakan ini dimulakan melalui saman pemula sementara permohonan untuk apa-apa relief yang dinyatakan

dalam perenggan 1 Jadual kepada AMK perlu dibuat di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 11–13).

(3) Walaupun kes ini merupakan kes yang berkepentingan umum yang melibatkan poin yang baru dan plaintif-plaintif adalah penuntut-penuntut, alasan-alasan ini mencukupi untuk membentuk alasan istimewa untuk mahkamah ini menyimpang daripada prinsip umum bahawa pihak yang berjaya berhak untuk dibayar kos. Oleh itu kos diberikan kepada defendan-defendan untuk ditaksir kecuali dipersetujui sebaliknya (lihat perenggan 17).]

Notes

For cases on application for Erinford injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3141–3171.

For cases on declaration, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 215–225.

For a case on power to award costs, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2224.

For cases on validity of impugned legislation, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2551–2556.

Cases referred to

Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed) [2008] 1 MLJ 317; [2008] 1 CLJ 169, CA (refd)

Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243; [1982] 1 LNS 1, FC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321, FC (refd)

Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25; [1986] 1 LNS 81, SC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3) [2010] 2 MLJ 141; [2010] 1 CLJ 429, FC (refd)

Vethanayagam v Karuppiah & Ors [1968] 1 MLJ 283; [1968] 1 LNS 166 (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Rules of the High Court 1980 O 53, O 53 r 1
Specific Relief (Malay States) Ordinance 1950 ss 52, 54
Universities and Universities Colleges Act 1971 s 15(5)(a)

Malik Imtiaz Sarwar (Haris Ibrahim with him) (Kandiah Partnership) for the plaintiffs.

Noor Hisham Ismail (Senior Federal Counsel, Attorney General's Chambers) for the first and second defendants.

Muhammad Shafee Abdullah (R Vasanthi and Sarah Abishegam with him) (Shafee & Co) for the third defendant.

Aziah Ali J:

[1] The plaintiffs vide this originating summons sought the following orders (encl 1):

(1) Deklarasi bahawa Seksyen 15(5)(a) Akta Universiti & Kolej Universiti 1971 (selepas ini dirujuk sebagai 'AUKU') adalah bertentangan dengan Perlembagaan Persekutuan 1957, khususnya Fasal 10(1)(a) dan adalah tidak sah;

(2) Deklarasi bahawa tindakan tatatertib yang dibawa oleh pihak Defendan Ketiga terhadap Plaintif-Plaintif atas tuduhan kesalahan berhubungkait sekatan di bawah Seksyen 15(5)(a) AUKU adalah tidak berasas dan tidak sah di sisi undang-undang dan di bawah fasal 10(1)(a) Perlembagaan Persekutuan;

(3) Kos permohonan ini ditanggung oleh Defendan-Defendan; dan

(4) Lain-lain perintah yang difikirkan perlu atau sesuai oleh Mahkamah yang Mulia ini.

[2] Pending the disposal of encl 1, the plaintiffs vide summons in chambers encl 4 sought an interim injunction on an undertaking as to damages as follows:

(a) Suatu injunksi interim dikeluarkan sementara menunggu pelupusan penuh tindakan Plaintif-Plaintif ini atau sehingga Perintah lanjut oleh Mahkamah Yang Mulia ini untuk menghalang Defendan Ketiga, pengkhidmatnya, ejen atau sesiapa yang lain daripada meneruskan dengan tindakan tatatertib yang dibawa terhadap Plaintif-Plaintif berdasarkan Notis bertarikh 13–5–2010 atas tuduhan kesalahan berhubungkait sekatan di bawah Seksyen 15(5)(a) AUKU

Due to the urgent nature of the substantive application, the third defendant agreed not to proceed with the disciplinary action commenced against the plaintiffs pending the disposal of encl 1. It was agreed that the application for an interim injunction made vide encl 4 be disposed of together with the substantive application encl 1.

[3] On 28 September 2010 I dismissed both encls 1 and 4 with costs to the defendants to be taxed unless otherwise agreed. An appeal has been filed against my decision.

[4] Pursuant to my decision counsel for the plaintiffs made an oral application for the grant of an Erinford injunction pending appeal. The grounds relied on by the plaintiffs as special circumstances essentially are as follows:

(a) if the status quo is not preserved the appeal would be rendered nugatory/academic should the Court of Appeal decide that s 15(5)(a) of the Act is unconstitutional;

(b) there is a reasonable prospect that the Court of Appeal may take a view that is different from the High Court on the issue of the constitutionality of s 15(5)(a);

(c) the application is not frivolous;

(d) this case involves a novel point;

(e) greater hardship will be caused to the plaintiffs if an Erinford injunction is not granted;

(f) if an Erinford injunction is not granted it would have a great impact on the plaintiffs who are final year students and will be graduating in July 2011; and

(g) the court has jurisdiction to grant an Erinford injunction under para 1 of the Schedule to the Courts of Judicature Act 1964.

[5] The application was opposed by the defendants on the following grounds:

(a) that the substantive application is for declaratory orders;

(b) that upon making a decision on encl 1, the court is functus officio; and

(c) that there was no application for an interlocutory injunction and therefore the court is deprived of jurisdiction to entertain an application for an Erinford injunction.

ERINFORD INJUNCTION

[6] Counsel for the third defendant submits that an injunction is not a cause of action but merely a relief and no injunctive relief is available pursuant to declaratory orders made since declaratory orders merely state the position in law. Counsel referred to PW Young '*Declaratory Orders*(2nd Ed)', at para 2408 which reads as follows:

> The effect of a declaratory order is almost universally that the court merely authoritatively indicates that a certain interpretation has always been the true interpretation of an act or document, or alternatively, that an administrative decision etc has always been void. The effect of the court's order is not to create rights but merely to indicate what they have always been… Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings. Thus, if it is held that the decision of a licensing authority is void and accordingly the licenses issued are null and void, there is no procedure whereby the court can validate those licences pending the hearing of an appeal.

Hence it is submitted that once the court has made its decision on the declarations sought for, the court is functus officio.

[7] I agree with counsel for the defendants that the issue of a stay does not arise where the relief sought for is a declaratory order. However I am of the view that the reason is due to the nature of a declaratory judgment as stated by PW Young referred to above rather than on the ground of functus officio.

[8] A declaratory judgment makes no positive order and cannot be enforced by execution. This has been clarified by Gopal Sri Ram FCJ in the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141; [2010] 1 CLJ 429 wherein His Lordship said, inter alia, as follows:

> The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v Grewal* [1975] Cri LJ 679, the court held as follows:
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> A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement-debtor and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgement-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.
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> In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise.

Following the abovementioned authority, a stay of a declaratory judgment does not arise.

[9] In the originating summons encl 1 the plaintiffs did not apply for an injunction. The interim injunction was applied for vide summons in chambers encl 4. In the case of *Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed)* [2008] 1 MLJ 317; [2008] 1 CLJ 169 Sulaiman Daud JCA said, inter alia:

> It is well settled that the court has jurisdiction on dismissal of an application for an interlocutory injunction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal … known as an Erinford injunction …

In the earlier case of *Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283; [1968] 1 LNS 166, Raja Azlan Shah J (as His Majesty then was) said, inter alia:

> An order for a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. If, therefore, in the event of the plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction (see *Bishun Prashad v Sashi Bhusan,* AIR 1923 Pat 133). In other words, a temporary injunction will not be granted in cases where a permanent injunction is not available under ss 52 to 54 of the Specific Relief (Malay States) Ordinance, 1950.

I agree with the defendants that since there was no application for an

injunction made in the originating summons, the court has no jurisdiction to entertain an application for an Erinford injunction. Likewise the court has no jurisdiction to entertain the application for an interim injunction made vide encl 4.

[10] Learned counsel for the plaintiffs relied on para 1 of the Schedule to the Courts of Judicature Act 1964 as conferring jurisdiction on the court to grant the Erinford injunction based on the words 'or any others' appearing in the said provision. Paragraph 1 of the said Schedule provides as follows:

> ADDITIONAL POWERS OF HIGH COURT
>
> (1) Prerogative writs
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> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[11] Paragraph 1 specifically states 'Prerogative writs'. In interpreting the provisions of para 1, the intention of the provision as a whole must be looked at. Where general words follow particular and specific words of one genus, the presumption is that the general words are restricted to the same genus as the preceding particular words unless it can be shown that a wider sense is intended. In the Federal Court case of *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243; [1982] 1 LNS 1, Seah J in his dissenting judgment had this to say on the general rule of construction of a provision where a particular class is stated followed by general words:

> It is a general rule of construction that where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis with such class (*per Pollock CB in Lyndon v Standbridge* (1857) 2 H & N 45 at p 51; 157 ER 19 at p 22). And in *Queen v Edmundson* (1858) 28 LJMC 213 at p 215; 121 ER 30 at p 33 Lord Campbell CJ said:
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> The general principle laid down in all the cases which have been cited is that, where particular words are followed by general words, the latter must be construed as ejusdem generis with the former.

The application of the *ejusdem generis* principle is also found in the judgment of Arifin Zakaria FCJ (now CJ Malaya) in the case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321.

[12] An Erinford injunction is not of the same genus as 'habeas corpus, mandamus, prohibition, quo warranto and certiorari' and the *ejusdem generis* principle does not apply. Hence I am unable to agree with counsel for the

plaintiffs that Erinford injunction comes within the words 'or any others' in para 1. Paragraph 1 of the Schedule ought not to be interpreted as conferring jurisdiction on the court to grant an Erinford injunction.

[13] Further this action was commenced by way of originating summons. An application for any relief specified in para 1 of the Schedule must be made under O 53 of the Rules of the High Court 1980. Order 53 r 1 provides as follows:

Order 53

APPLICATION FOR JUDICIAL REVIEW

(1) (1) This Order shall govern all applications seeking the relief specified in para 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

In the present application I am of the opinion that reliance on paragraph 1 of the Schedule is misconceived.

[14] For the aforementioned reasons I dismissed the application for an Erinford injunction.

COSTS

[15] Counsel for the plaintiffs raised the issue of costs in respect of encls 1 and 4 which had been awarded to the respondents. It is submitted that the court had not heard parties on the issue of costs. It is true that the court did not hear submissions on costs. No submissions on costs were made at the conclusion of the hearing of encl 1. Neither was a request to be heard on the issue of costs made at the time judgment was delivered. Counsel for the plaintiffs submits that the court still has power to amend the order on costs as the order has not been perfected.

[16] In the case of *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25; [1986] 1 LNS 81, Hashim Yeop A Sani SCJ sets out the general principles governing costs as follows:

> The general principle envisaged in the rule is simply that costs follow the event and except when it appears to the court that in the circumstances of the case some other order should be made. The same principle was enunciated in greater detail by Parker LJ in *Ottway v Jones* [1955] 2 All ER 585 at p 591:
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> > One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt, also, where a plaintiff has wholly failed to

establish his title or his right, it is impossible judicially to order the successful defendant to pay the plaintiff's costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right.

[17] In respect of encls 1 and 4, when considering the issue of costs, I did consider the grounds referred to by the plaintiffs' counsel that this is a public interest case involving a novel point and the plaintiffs are students. However I am of the view that these grounds are insufficient to constitute special grounds for me to depart from the general principle that the successful party is entitled to be paid his costs. Therefore I exercised my discretion and ordered costs to the defendants to be taxed unless otherwise agreed. In respect of the present application, for the same reason, costs is awarded to the defendants to be taxed unless otherwise agreed.

[18] Counsel for the plaintiffs submits that since the order has not been perfected, the court can still review the order on costs. Counsel for the third defendant pointed out that judgment had been written and therefore the court cannot alter the judgment. In fact parties had been supplied with the written grounds of judgment. In the circumstances I agree with counsel for the third defendant that I have no power to reconsider and amend my order on costs. Further I am of the opinion that insofar as encls 1 and 4 are concerned I am functus officio. The order on costs in respect of encls 1 and 4 is maintained.

Enclosures 1 and 4 and application for Erinford injunction dismissed with costs to the defendants to be taxed.

Reported by Kohila Nesan